

IN THE
SUPREME COURT OF THE UNITED STATES

Moore v. United States of America

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

ATTACHMENT A

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 10, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEREK JEROME MOORE,

Defendant - Appellant.

No. 20-1407
(D.C. No. 1:19-CR-00218-PAB-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON, BRISCOE, and PHILLIPS**, Circuit Judges.

On appeal, Derek Moore contests the validity of his guilty plea to violating 18 U.S.C. § 922(g)(1). Because his arguments directly conflict with established precedent, we affirm.

BACKGROUND

While Moore was detained at Denver Detention Center in March 2019 for driving under the influence, he hid a firearm in his pants and later stashed that

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

firearm in the toilet of his holding cell. The firearm, recovered by cleaning personnel after Moore was released on bond, was a Beretta 9mm semiautomatic pistol loaded with seven rounds of ammunition—including one round in the chamber.

Based on Moore’s criminal history, he was charged with knowingly possessing a firearm as a previously convicted felon in violation of § 922(g)(1). With a total offense level of 12 and a criminal history category of V, the recommended Guidelines range for his sentence was between 27 and 33 months in prison. The sentencing judge imposed a 27-month sentence. Moore appealed.

Moore now challenges his guilty plea. Recognizing that current precedent forecloses his arguments, he asserts his claims for preservation purposes only, in the event that pending litigation elsewhere changes the law. Reviewing under 28 U.S.C. § 1291, we affirm.

DISCUSSION

On appeal, Moore contests the validity of his guilty plea on two grounds: (1) that Congress exceeded its Commerce Clause authority by banning felons from possessing firearms under § 922(g)(1); and (2) that by its terms, § 922(g)(1) applies only when the defendant’s own possession of the firearm affected commerce at the time that the defendant possessed it. Because Moore failed to raise these claims below, we review for plain error. *United States v. Dazey*, 403 F.3d 1147, 1174 (10th Cir. 2005) (citations omitted).

To his first point, Moore contends that § 922(g)(1) creates a “minimal nexus with interstate commerce” because it is construed to require “proof that the firearm in

question moved across state lines—even if it did so before the person became a felon or possessed the firearm.” Appellant’s Br. at 4 (citations omitted). That is, he argues, the nexus is “too attenuated” to justify Congress’s use of the Commerce Clause power in enacting § 922(g)(1). *Id.* (citation omitted).

But as Moore concedes, this claim is foreclosed by *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir. 1995). In *Bolton*, we recognized that though the Supreme Court has previously struck down other subsections of § 922, which contain “no jurisdictional element [to] ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce,” § 922(g) presents a different scenario. *Id.* (quoting *United States v. Lopez*, 541 U.S. 549, 561 (1995)).

Section 922(g) prohibits a convicted felon from “possess[ing] in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” Thus § 922(g)’s “requirement that the firearm have been, at some time, in interstate commerce is sufficient to establish its constitutionality under the Commerce Clause.” *Bolton*, 68 F.3d at 400 (citations omitted); *see also United States v. Griffith*, 928 F.3d 855, 865 (10th Cir. 2019) (citing § 922(g)(1) as having “specifically passed constitutional scrutiny under the Commerce Clause” (citations omitted)). *Bolton* and its Tenth Circuit progeny remain binding, so we cannot overturn Moore’s guilty plea on this basis. *See United States v. Lira-Ramirez*, 951 F.3d 1258, 1260–61 (10th Cir. 2020) (“We must generally follow our precedents absent en banc consideration.” (citation omitted)).

To Moore’s second point, he argues that “[t]he mere fact that a firearm was previously shipped or transported in interstate or foreign commerce is not enough to establish that the defendant’s possession was ‘in or affecting commerce,’ as required by § 922(g)(1).” Appellant’s Opening Br. at 5. Relying on the statutory language, he contends that “the offense of *possessing* a firearm in violation of § 922(g)(1) requires proof that the defendant’s *own* possession of the firearm affected commerce *at the time that he possessed it*.” *Id.* at 6.

But Moore recognizes that this claim is also barred under current precedent. “The Supreme Court has affirmed . . . that: ‘[T]he interstate commerce nexus requirement of the possession offense [is] satisfied by proof that the firearm [defendant had] possessed had previously traveled in interstate commerce.’” *United States v. Hoyle*, 697 F.3d 1158, 1165 (10th Cir. 2012) (second alteration in original) (quoting *Scarborough v. United States*, 431 U.S. 563, 566 (1977)). Again, precedent binds us on this issue so we refuse to overturn Moore’s conviction on this basis.

CONCLUSION

For the foregoing reasons, we affirm.

Entered for the Court

Gregory A. Phillips
Circuit Judge